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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1088

HENRY A. KISSINGER,
Petitioner,
v.
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al.,
Respondents.

HENRY A. KISSINGER,
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v.
MILITARY AUDIT PROJECT, et al.,
Respondents.

REPLY BRIEF OF PETITIONER HENRY A. KISSINGER

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THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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This Reply Brief responds to the briefs in opposition to Dr. Kissinger's Petition for a Writ of Certiorari in No. 78-1088 filed by the Reporters Committee for Freedom of the Press, et al. (the "RCFP respondents") and by the Military Audit Project, et al. (the "MAP respondents").[1] It also

[1]The RCFP and MAP respondents are collectively referred to as the "private respondents." Their opposition briefs are referred to, respectively, as "RCFP Opp." and "MAP Opp." The RCFP respondents have also filed a cross-petition for certiorari in No. 78-1217 ("RCFP Pet."). Dr. Kissinger's brief in opposition to the cross-petition ("Kissinger Opp.") was filed on March 7, 1979.

responds to the briefs filed by the federal respondents in Nos. 78-1088 and 78-1217 ("Fed. Resp. Kissinger Br.") and in *Forsham v. Califano* (No. 78-1118) ("Fed. Resp. Forsham Br.").

We agree with the federal respondents' conclusion that the central issue in all three petitions is whether the Freedom of Information Act ("FOIA") applies to documents not in the custody or control of an agency when a FOIA request is made with respect to them.[2] We also agree that this issue poses an important question concerning the scope of a frequently-litigated federal statute, that the issue is likely to recur, and that it is unlikely to be resolved without a definitive ruling by this Court.[3] We do not, however, accept the federal respondents' suggestion that the remaining issues presented by Dr. Kissinger's Petition are not sufficiently important to merit review by this Court. Although a decision that FOIA has no

[2]*Kissinger* involves two different categories of documents. The first (at issue in No. 78-1088) consists of rough notes made of Dr. Kissinger's telephone conversations when he was Secretary of State; the second (at issue in No. 78-1217) consists of similar notes made when Dr. Kissinger was Assistant to the President. Although the State Department period notes were produced on State Department premises, the agency never legally possessed them at any time because the Department's rules give it no right to inspect papers that are maintained (as were these) in an employee's personal files. Kissinger Pet. at 24 n.22. The same is true of the White House period notes, which were produced outside an "agency" and were only stored there in Dr. Kissinger's private files while he was Secretary of State. Kissinger Opp. at 6-7. That the State Department never had legal possession or custody of any of the notes is an additional reason why none of them can be its "records."

[3]The private respondents have suggested that this issue has no importance because the federal respondents "do not quarrel with" the district court's order. RCFP Opp. at 19; *see also* MAP Opp. at 6-7. It is now apparent that the federal respondents *do* quarrel with the portion of the district court's order that is adverse to Dr. Kissinger. Their willingness to present the Government's views on the issue should certiorari be granted effectively disposes of the notion that the Government's interests will not be affected if the decision below is allowed to stand.

application to documents not in the custody or control of an agency would make it unnecessary to decide these questions, we submit that they are too important to be ignored if the Court concludes that the relief granted in No. 78-1088 — but denied in No. 78-1217 and in *Forsham*[4] — should have been afforded in all three cases.

1. The private respondents argue that the notes are "agency records" because the Government, as Dr. Kissinger's employer, "owns" all documents that he produced within the scope of his employment.[5] The federal respondents plainly do not accept the notion that common law property concepts can supplant the standards established by the Federal Records Act. They nonetheless suggest that "at least some" of the State Department period notes are federal records within the meaning of 44 U.S.C. §3301, because "the notes include many conversations relating directly to the transaction of public business." Fed. Resp. Kissinger Br. at 10.[6] This is a curious

[4]The Court of Appeals held in *Kissinger* that notes made of Dr. Kissinger's conversations when he was Secretary of State could be ordered returned to the State Department for FOIA processing despite the fact that these documents were not then, and never had been, in the agency's custody or control. A different panel of the same court held in *Forsham* that documents which an agency did not choose to possess were not "agency records" subject to FOIA disclosure. It is, of course, impossible to reconcile the result in No. 78-1088 with the decision in *Forsham*. Although the "possession" issue is also present in No. 78-1217, we believe certiorari need not be granted for that case because the factual record necessary to permit meaningful review of the questions it presents was not properly developed below. *See* Kissinger Opp. at 5-9.

[5]A similar argument is made by the petitioners in *Forsham*. Forsham Pet. at 15-18.

[6]The federal respondents also state that "the notes were preserved in part to provide a record of the functions, policies, and decisions of the government." *Id.* We do not understand this statement. It is clear that the *State Department* did not "preserve" the notes as evidence of its "functions, policies, and decisions." The records of Dr. Kissinger's oral commitments, decisions and significant discussions which the

conclusion in view of their statement, made elsewhere in the same brief, that the notes from the White House period would not be National Security Council records simply because they "'relate to the affairs of the NSC.'" *Id.* at 8 n.5.

The reality is that the question whether any particular document is an "agency record" cannot be resolved by a casual reference to the language of 44 U.S.C. §3301. Although the statutory definition of "records" is broad, the legislative history makes clear that agencies "are not obliged to consider every scrap of paper on which writing or printing appears as a record."[7] Nor do agencies treat all documents that their employees create as "records."

An exhaustive study of this question conducted by the National Study Commission on Records and Documents of Federal Officials confirms the existence of large quantities of written materials that routinely are *not* filed as agency records even though these materials are generated by government employees, used by them in the performance of their duties, and plainly relate to the transaction of public business.[8] Such "non-record materials" are not filed as official records because they do not constitute "required documentation" of the agency's functions, policies and decisions. Indeed, guidelines issued by the General Services

Department preserved were the finished memoranda of conversations and copies of correspondence that Dr. Kissinger's staff created and filed as official records. Kissinger Pet. at 6 n.4. Dr. Kissinger's affidavit makes clear that he regarded the notes as "work aids which I could retain or discard as I chose." Pet. App. 74a. That *Dr. Kissinger* preserved the notes is fortuitous and can have no legal significance.

[7]H.R. Rep. No. 559, 78th Cong., 1st Sess., *reprinted in* [1943] U.S. Code Cong. Serv. 2140. *See generally*, Kissinger Pet. at 18-19.

[8]*See generally*, National Study Commission, Final Report (1977); Memorandum of Findings on Existing Custom or Law, Fact and Opinion (1977). Although Dr. Kissinger cited these reports in his Petition, neither the private respondents nor the federal respondents have referred to them.

Administration for the use of federal agencies in implementing the Federal Records Act expressly state that "non-record materials . . . shall not be incorporated in the official files of the agency." 41 C.F.R. §101-11.401-3(d).[9]

State Department regulations issued pursuant to those guidelines explicitly provide that "working papers, such as preliminary notes, do not constitute required documentation . . . ." 5 FAM §423.2-8.[10] Dr. Kissinger contends that the notes of his telephone conversations were properly classified as "non-record materials" under this and related agency regulations.[11] That contention was not even addressed below.

[9]The General Services Administration has authority to issue the guidelines, 44 U.S.C. §2904, to inspect agency records "for the purpose of rendering recommendations for the improvement of records management," 44 U.S.C. §§2906(a)(1), and to supervise the disposal of agency records. 44 U.S.C. §3302, 3314. It does not, however, have authority to determine whether a particular document should be filed and preserved as a "record" of an agency; that authority is vested exclusively in the agency. 44 U.S.C. §3101. The private respondents' suggestion that the notes should have been inspected by GSA archivists before they were donated to the Library of Congress is wholly without foundation; GSA has no authority to inspect or otherwise control the disposition of non-record materials.

[10]The private respondents ignore this regulation in their discussion of the "records" issue.

[11]The RCFP respondents assert that Dr. Kissinger's position rests on the argument that

> under State Department regulations, documents generated during [*sic* — in performance of?] a government employee's official duties will be treated as private property merely because he has filed them as 'personal' when they were prepared. RCFP Opp. at 11.

Dr. Kissinger does not contend that the notes are not records *because* he filed them as "personal," but rather that the notes were filed as personal because they were "non-record materials" which had no place in the official files. If such materials are not to be filed as official records, they may be discarded or kept as the employee chooses. If the employee chooses to keep the materials, his personal files are the

The proper definition of "agency records" for purposes of FOIA has caused considerable confusion in the lower courts.[12] That confusion will continue to complicate administration of the Act unless this Court provides guidance as to how the "agency records" language of FOIA is to be related to the provisions of the Federal Records Act.[13] This issue need not be reached if the Court concludes that the private respondents failed to state a claim under FOIA because their requests were made after the notes were transferred to the Library of Congress. However, the issue is significant, both for Dr. Kissinger and for FOIA litigants generally, and we submit that the Court should include it among the issues accepted for review.

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logical place in which to store them. The RCFP respondents could not have objected if Dr. Kissinger had discarded the notes. We fail to understand why his election to retain them in his personal files improves their case.

[12] *See, e.g., Forsham v. Califano*, 587 F.2d 1128 (D.C. Cir. 1978), *cert. pending*, No. 78-1118; *DiViaio v. Kelley*, 571 F.2d 538 (10th Cir. 1978); *Goland v. CIA*, No. 76-1800 (D.C. Cir., May 23, 1978); *Nixon v. Sampson*, 389 F.Supp. 107 (D.D.C.), *stayed sub nom. Nixon v. Richey*, 513 F.2d 427 (D.C. Cir. 1975), *dismissed as moot*, 437 F.Supp. 654 (D.D.C. 1977), *rev'd and remanded*, No. 77-2123 (D.C. Cir., Dec. 21, 1978); *Nichols v. United States*, 325 F.Supp. 130 (D.Kan. 1971), *aff'd*, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972); *Save the Dolphins v. Department of Commerce*, 404 F.Supp. 407 (N.D. Cal. 1975); *Porter County Chapter of the Izaak Walton League v. AEC*, 380 F.Supp. 630 (N.D.Ind. 1974). We note, in view of the private respondents' heavy reliance on *Nixon v. Sampson*, that the reported opinion is unsupported by an order and thus has been held by the Court of Appeals to be "without influence as a precedent." *Brandon v. Eckard*, 569 F.2d 683, 686 n.15 (D.C. Cir. 1977).

[13] Also important to resolution of this issue is the further question of the relationship between FOIA's *de novo* review standards and the general review standards established by the Administrative Procedure Act. *See generally*, Kissinger Pet. at 17-18, 22-23. This significant question is currently under review by this Court in a related context. *Chrysler Corp. v. Brown*, No. 77-992.

2. The federal respondents assert that Dr. Kissinger's privacy argument is "premature" because

> even if the district court's order is sustained, Kissinger will have a further opportunity to raise his constitutional objections to the release of any materials in which he has a significant privacy interest, if the Department decides to release any such materials at the conclusion of its review of the notes. Fed. Resp. Kissinger Br. at 11.[14]

This mischaracterizes the nature of Dr. Kissinger's privacy claims.

The bland suggestion that Dr. Kissinger's privacy argument is "premature" ignores the unprecedented and extraordinary violation of privacy rights called for by the order. The notes contain far more than details about Dr. Kissinger's private life. They also reflect privately-held political views, statements affecting the reputations of third parties, thoughts, opinions and beliefs on a variety of subjects, and information relating to Dr. Kissinger's associations with individuals and organizations. The notes were made and kept in the reasonable expectation that they were non-record materials which would not be part of any official file. The vice of the order is that it retroactively reclassifies the notes as "records" and requires that *all* of them, regardless of content, be read by Executive Branch employees to determine their FOIA status. According Dr. Kissinger an opportunity to object to public release of

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[14] The district court's order affords Dr. Kissinger "reverse FOIA" rights to object to release of any materials "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" within the meaning of 5 U.S.C. §552(b)(6). Pet. App. 60a-61a. Whether FOIA submitters are entitled to assert "reverse FOIA" claims is currently under review in *Chrysler Corp. v. Brown*, No. 77-992. There is, of course, no assurance that the district court's order would not be amended if this Court concludes in *Brown* that "reverse FOIA" claims are not authorized by FOIA.

materials otherwise exempt from disclosure under 5 U.S.C. §552(b)(6) does nothing to eliminate the egregious violation of constitutionally protected privacy rights which the inspection process requires.

Nixon v. Administrator of General Services, 433 U.S. 424 (1977), in no way supports the constitutionality of the inspection order. The far more elaborate[15] procedures at issue in *Nixon* were prescribed by a special statute enacted as an emergency measure to preserve the former President's papers from the imminent threat of destruction. There is no warrant whatever for the assumption that this Court's carefully qualified decision sustaining that legislation authorizes district courts to use a watered down version of the *Nixon* procedures as a substitute for the usual rules applicable to claims of privilege in civil cases.[16]

The mischievous notion that *Nixon* provides a model for future litigation involving constitutional privacy claims is itself sufficient reason to grant Dr. Kissinger's Petition. Although this issue need not be reached if the Court decides the first question as Dr. Kissinger and the federal respondents believe it should be decided, the constitutional issue cannot, in justice, be avoided if the Court carries its analysis beyond that threshold question.

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[15] *Compare* Pet. App. 59a-61a, *with* 44 U.S.C. §2107 *note*. §§102-105. *See also* 41 C.F.R. §§105-63.101-63.303 (procedures for processing the Nixon materials); 42 F.R. 63626-63629 (Dec. 16, 1977) (proposed public access rules).

[16] The private respondents' reliance on *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), as justification for Executive Branch inspection of the notes is plainly misplaced. *Rose* actually confirms the general principle, ignored below, that *in camera* review by an impartial judicial officer — not Executive Branch employees — is required when constitutional privacy rights are at stake. That review must take place *before* the privacy invasion, not afterwards.

CONCLUSION

For the foregoing reasons, petitioner urges the Court to grant certiorari as to all questions presented in No. 78-1088.

Respectfully submitted,

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